[Cite as *State v. Nieves*, 2009-Ohio-6374.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. MANUEL NIEVES Appellant	C.A. No. 08CA009500 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 04CR065988

DECISION AND JOURNAL ENTRY

Dated: December 7, 2009

CARR, Judge.

{¶1} Appellant, Manuel Nieves, appeals his conviction and sentence out of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} Late in the evening of August 14, 2004, Sam "Freddie" Walls, his girlfriend Angela Taylor, and their young child were watching a movie in their home. Angela's two other children were asleep upstairs. After dozing off, Ms. Taylor was awakened by the sound of two masked men, armed with a sawed-off shotgun, who were beating Mr. Walls, and asking him for money and drugs. The three victims were detained as the men robbed Ms. Taylor. The masked gunman forced Mr. Walls to another room and shot him. Both masked men fled. Mr. Walls died shortly thereafter. As a result of their investigation, the police determined that Manuel Nieves was the masked gunman who shot and killed Mr. Walls during the home invasion.

{¶3} On August 25, 2004, Nieves was indicted on one count of aggravated murder in violation of R.C. 2903.01(B), with a capital murder specification; one count of aggravated burglary in violation of R.C. 2911.11(A)(1); one count of aggravated burglary in violation of R.C. 2911.11(A)(2); one count of aggravated robbery in violation of R.C. 2911.01(A)(1); one count of aggravated robbery in violation of R.C. 2911.01(A)(3); three counts of kidnapping in violation of R.C. 2905.01(A); one count of murder in violation of R.C. 2903.02(A); one count of murder in violation of R.C. 2903.02(B); one count of felonious assault in violation of R.C. 2903.11(A)(1)/(2); one count of tampering with evidence in violation of R.C. 2921.12(A); one count of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A); and one count of having weapons under disability in violation of R.C. 2923.13(A)(3). In addition, all of the counts except the three kidnapping charges carried a 3-year firearm specification. Nieves pled not guilty to the charges.

{¶4} For close to four years, Nieves filed various motions, the State responded, and the trial court issued its rulings. Nieves repeatedly waived his statutory time for speedy trial pursuant to R.C. 2945.71 et seq.

{¶5} On June 4, 2008, Nieves executed a written waiver of his right to a trial by jury and elected to be tried by a three-judge panel. On June 10, 2008, two judges were chosen by random draw to complete the panel with the assigned trial judge. The journal entry stated, in part: "Said three judge panel shall consist of Judge James Miraldi (presiding) with Judge Burge and Judge Ewers acting as the balance of the three-judge panel to conclude all proceedings in the within matter." Nieves did not object.

{¶6} On June 11, 2008, a supplemental indictment was filed against Nieves, charging three counts of kidnapping in violation of R.C. 2905.01(A)(2), each with a firearm specification;

and one count of murder in violation of R.C. 2903.02(B), with a firearm specification. Nieves pled not guilty to the supplemental charges.

{¶7} The matter proceeded to trial before the three-judge panel. At the beginning of trial, the State dismissed one count of aggravated robbery (count five). The State further dismissed the three original counts of kidnapping (counts six, seven and eight) and proceeded on the three supplemental counts of kidnapping (counts fifteen, sixteen and seventeen). Finally, the State dismissed the original count of murder in violation of R.C. 2903.02(B) (count ten) and proceeded on the supplemental count of murder in violation of R.C. 2903.02(B) (count eighteen).

{¶8} At the conclusion of trial, the three-judge panel found Nieves not guilty of aggravated murder and murder in violation of R.C. 2903.02(A). The three-judge panel found Nieves guilty of two counts of aggravated burglary, three counts of kidnapping, and one count each of aggravated robbery, felonious assault, tampering with evidence, unlawful possession of a dangerous ordnance, having weapons under disability, and murder in violation of R.C. 2903.02.(B). In addition, the panel found Nieves guilty of eight 3-year firearm specifications, and three 1-year firearm specifications.

{¶9} Immediately after announcing its verdict on the record, the three-judge panel proceeded with sentencing. Nieves did not object to sentence being rendered by the panel of judges. The three-judge panel sentenced Nieves to an aggregate sentence of thirty-five years to life in prison as follows. The panel merged all the 3-year firearm specifications into one 3-year term, and merged all the 1-year firearm specifications into one 1-year term, with those two terms to be served consecutively. The panel ordered that some prison terms for the underlying offenses would be served consecutively, while others would be served concurrently. The panel imposed no sentence for the second count of aggravated burglary upon finding that it was an allied

offense of the first count of aggravated burglary. Nieves filed a timely appeal, raising four assignments of error for review.

II.

ASSIGNMENT OF ERROR I

> "THE APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶10} Nieves argues that his convictions are against the manifest weight of the evidence. This Court disagrees.

> "In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, paragraph one of the syllabus.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. Id. at 340.

{¶11} Although Nieves was convicted of eleven offenses, he does not argue that his convictions are against the manifest weight of the evidence because the State failed to prove the elements of any specific offense(s). Nieves argues that the evidence implicates Angel Vargas at a minimum as a coconspirator, if not the principal offender. Accordingly, he argues that his convictions are against the manifest weight of the evidence because three witnesses, specifically siblings Angel Vargas, Jennifer Vargas, and Daniel Martinez, were not credible witnesses because of their interest in protecting Angel.

{¶12} Nieves offers two theories in support of his argument that the evidence indicates Angel Vargas' involvement in the crimes instead of his own. First, he asserts that one of the

victims, Angela Taylor, identified Angel Vargas as one of the men who entered her home and shot and killed her live-in boyfriend Sam "Freddie" Walls.

{¶13} Ms. Taylor testified that she awoke to see two men in masks in her home. She testified that she did not see their faces but she knew they were Hispanic by their voices. Ms. Taylor described one man as skinny and the other as heavyset. She testified that the heavyset man held a sawed-off shotgun in his left hand. Other evidence indicated that Nieves is ambidextrous, while Angel is right-handed. Ms. Taylor testified that she told the police that she knew only two Hispanic men whom she identified as Angel Vargas and Jose Rosado. Although she admitted telling police that she thought one of the men in her home was Angel Vargas because of his voice, mannerisms, and general appearance, she emphasized that she did not know who was behind the masks. Other evidence established that Angel Vargas was not heavyset in August 2004. Ms. Taylor denied telling the police that she thought Angel Vargas was the man with the shotgun. She testified that she had never met Nieves at the time of the incident on August 14, 2004. Accordingly, she could not have identified Nieves by name as one of the perpetrators. A review of Ms. Taylor's testimony indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Nieves. The weight of Ms. Taylor's testimony supports the conclusion that Nieves, rather than Vargas, was involved in the commission of the crimes for which he was convicted.

{¶14} Nieves' second theory in support of his argument that the evidence indicates Angel Vargas' involvement in the crimes instead of his own is that "forensic evidence could have linked Angel Vargas to the Walls murder; however, the potential evidence was ignored during the underlying investigation." It is true that the police did not collect samples from Angel Vargas for purposes of DNA testing or to test for the presence of gunshot residue on his hands.

{¶15} There was evidence that the man who wielded the sawed-off shotgun which killed Mr. Walls wore gloves. The police recovered gloves during the course of their investigation. Various witnesses testified that Nieves was wearing gloves prior to the incident. Melissa Zielaskiewicz, a forensic scientist in the forensic biology DNA section of the Bureau of Criminal Identification and Investigation ("BCI"), testified that she tested blood found on those gloves. She testified that there were two blood profiles on the gloves, specifically, a major profile consistent with the victim's DNA, and a minor profile consistent with Nieves' DNA. She testified that there were no other DNA profiles on the gloves.

{¶16} Martin Lewis, a forensic scientist in the trace evidence section of BCI, testified that he performed gunshot residue analyses on samples taken from the victim's hands, Ms. Taylor's hands, and the two gloves. He testified that he did not find particles highly indicative of gunshot residue on any of the samples. He testified, however, that longer weapons like shotguns produce less gunshot residue. In addition, Mr. Lewis testified that gunshot residue dissipates from an object the more it is handled. Other evidence indicated that the gloves obtained by the police had been moved several times and placed in a plastic garbage bag with other clothing.

{¶17} A thorough review of the record indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Nieves. While samples from Angel Vargas were not obtained in order to test for the presence of his DNA or gunshot residue on his hands, there was forensic evidence linking Nieves to the crime. Specifically, gloves identified as those worn by Nieves on the evening of the incident tested positive for both the victim's and Nieves' blood. Accordingly, our review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Nieves.

{¶18} Finally, Nieves argues that his conviction is against the manifest weight of the evidence because Angel Vargas, Jennifer Vargas, and Daniel Martinez were not credible witnesses. While this Court must weigh the evidence and consider the credibility of witnesses, it is well settled that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶19} In this case, Angel Vargas testified that, on August 14, 2004, Nieves and Jose Rosado "wanted to hit a lick" on Mr. Walls, meaning they wanted to rob him. Angel testified that Nieves had a shotgun with him that day, and that Nieves and Rosado went to Mr. Walls' house. Angel testified that he and his sister Jennifer Vargas walked a different way to Mr. Walls' house to watch because Jennifer was dating Rosado. Angel testified that he saw Nieves kick Mr. Walls' door. He testified that he later heard a "bang" and saw Nieves and Rosado running from the victim's home. Angel testified that Nieves later told him that he entered Mr. Walls' home, hit the victim repeatedly with the gun, and shot the victim as he tried to run. Angel testified that he considered Nieves to be like a "brother."

{¶20} Jennifer Vargas corroborated much of Angel's testimony. She testified that Angel and Nieves were best friends. She testified that Jose Rosado was her boyfriend.

{¶21} Daniel Martinez is Angel Vargas' brother. Daniel was eleven years old at the time of the incident. He testified that Nieves and Rosado were at his house on August 14, 2004, discussing "getting some money." Daniel testified that Nieves later got a shotgun out of a car and put it in his coat. He testified that Nieves and Rosado then walked to the side of the house, while Angel and Jennifer Vargas walked in a different direction. Daniel testified that Nieves and Rosado returned later, "breathing really fast, like something already happened." He testified that

they walked towards Angel's room and that one of them entered his bedroom. Daniel testified that Nieves and Rosado then left in a car.

{¶22} This Court will not disturb the factual determinations of the triers of fact because they are in the best position to determine the credibility of the witnesses during trial. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22. In addition, this Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the triers of fact chose to believe certain witness' testimony over the testimony of others. Id. While Angel, Jennifer, and Daniel are siblings who might want to protect one another, there was evidence that Jennifer was dating Rosado, and that Angel and Nieves were as close as brothers. This Court will not overturn Nieves' conviction on his manifest weight of the evidence challenge only because the three-judge panel chose to believe certain testimony after assessing the credibility of the witnesses.

{¶23} Nieves' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE APPELLANT'S SENTENCE IS VOID WHERE THE SENTENCE WAS IMPOSED BY A THREE-JUDGE PANEL THAT LACKED THE JURISDICTION TO SENTENCE THE APPELLANT."

{¶24} Nieves argues that his sentence is void because the three-judge panel lacked jurisdiction to sentence him. This Court disagrees.

{¶25} R.C. 2945.06 addresses situations implicating the use of a three-judge panel and provides, in part:

> "In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges ***. The judges

> or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death."

{¶26} Nieves argues that his sentence is void because it was rendered by a three-judge panel in contravention of R.C. 2945.06, which divested the trial court of jurisdiction. In discussing subject matter jurisdiction, the Ohio Supreme Court has stated:

> "Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. It is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." (Internal citations and quotations omitted.) *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶11.

The *Pratts* court addressed a third category of jurisdiction, distinct from subject matter and personal jurisdiction, specifically "a court's exercise of jurisdiction over a particular case." Id. at ¶12. The Supreme Court explained:

> "The third category of jurisdiction [i.e., jurisdiction over the particular case] encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable." (Internal quotations omitted.) Id.

{¶27} R.C. 2931.03 vests the common pleas court with original jurisdiction of all crimes and offenses, except for minor offenses. Nieves argues that the three-judge panel lacked jurisdiction to collectively sentence him because R.C. 2945.06 does not provide for sentencing by a three-judge panel when the defendant has not been convicted of the capital offense with which he was charged. The *Pratts* court rejected the argument that R.C. 2945.06 creates a

unique form of jurisdiction, the requirements of which must be followed to impute subject matter jurisdiction to the trial court. Rather, the high court stated:

> "'Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the 'exercise of jurisdiction,' as distinguished from the want of jurisdiction in the first instance.'" Id. at ¶22, quoting *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240.

The proper remedy for an error in the trial court's exercise of jurisdiction is by way of direct appeal. *Pratts* at ¶24. Accordingly, a defendant may properly assert in a direct appeal that his sentence is voidable under these circumstances, rather than void.

{¶28} In this case, the three-judge panel announced its verdict on the record and proceeded immediately to sentencing. The presiding judge of the panel inquired whether defense counsel had anything to say on behalf of his client prior to the panel's pronouncement of sentence. Neither Nieves nor his counsel objected to the panel pronouncing sentence.

{¶29} This Court has long held that "an appellate court will not consider as error any issue a party was aware of but failed to bring to the trial court's attention[]" at a time when the trial court might have corrected the error. *State v. Dent*, 9th Dist. No. 20907, 2002-Ohio-4522, at ¶6. "[F]orfeiture is a failure to preserve an objection[.] *** [A] mere forfeiture does not extinguish a claim of plain error under Crim.R. 52(B)." (Internal citations omitted.) *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. By failing to raise the issue below, Nieves has forfeited his objection to the alleged improper sentencing by the three-judge panel. Further, as Nieves has failed to argue plain error on appeal, this Court will not consider whether the panel's rendering of sentence constituted plain error. See *State v. Knight*, 9th Dist. No. 03CA008239, 2004-Ohio-1227, at ¶10. Nieves' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT'S SENTENCE IS CONTRARY TO LAW WHERE THE COURT FAILED TO MERGE SEVERAL OFFENSES IN VIOLATION OF OHIO'S ALLIED OFFENSE STATUTE."

{¶30} Nieves argues that the trial court erred by sentencing him on allied offenses of similar import. This Court disagrees.

{¶31} R.C. 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." The Ohio Supreme Court has established a two-part test to determine whether two crimes are allied offenses of similar import. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Emphasis omitted.) Id., citing *State v. Mughni* (1987), 33 Ohio St.3d 65, 67; *State v. Talley* (1985), 18 Ohio St.3d 152, 153-154; *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418; *State v. Logan* (1979), 60 Ohio St.2d 126, 128.

Moreover,

> "[i]n determining whether offenses are allied offenses of similar import under R.C. 2945.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar imports." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

{¶32} Nieves first argues that the three counts of kidnapping are allied offenses with the count of aggravated robbery. This Court disagrees.

{¶33} Nieves was convicted of kidnapping in violation of R.C. 2905.01(A)(2), which states that "[n]o person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person *** [t]o facilitate the commission of any felony or flight thereafter[.]" He was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), which states that "[n]o person, in attempting or committing a theft offense, *** or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]" R.C. 2923.11(A) defines "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." Firearms constitute deadly weapons. R.C. 2923.11(B)(1).

{¶34} The Ohio Supreme Court, in recognition of thirty years of precedent, recently reiterated its holding that "[t]he crime of kidnapping, defined by R.C. 2905.01(A)(2), and the crime of aggravated robbery, defined by R.C. 2911.01(A)(1), are allied offenses of similar import pursuant to R.C. 2941.25." *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, at syllabus. The *Winn* court, however, did not analyze the second step of the *Blankenship* test because the State failed to challenge the appellate court's determination that the defendant did not have a separate animus for the crimes. *Winn* at ¶10. In this case, the State argues that Nieves had a separate animus for committing the kidnappings and the aggravated robbery because Ms. Taylor and her young son were forced to stay in the living room after Ms. Taylor was robbed of $40.00, while Nieves forced Mr. Walls into another room.

{¶35} The Ohio Supreme Court has held that prolonged restraint, even in the absence of asportation of the victim, may support a conviction for kidnapping as a separate act or animus from that of the underlying crime. *State v. Logan* (1979), 60 Ohio St.2d 126, 135. "The primary issue, however, is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." Id. The question for consideration is "whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime." Id.

{¶36} Sam "Freddie" Walls was commonly known as the "weed man" because he sold marijuana out of his house. Angel Vargas testified that Nieves and Jose Rosado discussed "hit[ting] a lick" on Mr. Walls, meaning that they wanted to rob him. Angel testified that Nieves told him he entered Mr. Walls' house, pointed a gun and asked Mr. Walls "where it was at." Angel testified that Nieves confessed that he got a "[c]ouple of sacks, $40" as a result of the incident. Daniel Martinez testified that he overheard Nieves and Rosado talking about "getting some money." Jennifer Vargas testified that Nieves and Rosado mentioned that Mr. Walls had a couple of pounds of "weed" and they were going to try to get some of that "weed."

{¶37} Angela Taylor testified that she was awakened by the sound of someone hitting Mr. Walls over the head with a gun and asking where the money and "weed" were. She testified that the heavyset man ordered her to stand while the thinner man went through her pockets looking for money. She testified that every time she tried to say something, the heavyset man "put the gun to [her]." She testified that the thinner man then held her three-year old child, and the heavyset man forced her to lie on the ground beside Mr. Walls. Ms. Taylor testified that the heavyset man then forced Mr. Walls into another room, while the thinner man started throwing

pillows off the furniture as she lay on the floor. She testified that soon after the heavyset man forced Mr. Walls into another room, she heard a "punch," followed by a gunshot, and both masked men ran out of the house.

{¶38} Based on a review of the facts in this case, the restraint and/or asportation of the three victims presented a "substantial increase in the risk of harm separate from that involved in [the underlying aggravated robbery]." See id. at 135. Ms. Taylor and her young child continued to be restrained even after she was robbed of all the money on her person. Nieves threatened harm to Ms. Taylor by "put[ting] the gun to [her]" every time she tried to speak. Moreover, the three-year old child was restrained notwithstanding the fact that he was never the victim of a theft; nor was it likely that he could have either thwarted Nieves' plan to rob the home or contacted the authorities. Nieves' kidnappings of Ms. Taylor and her young child "took on a significance of [their] own" as his accomplice continued to restrain them as Nieves forced Mr. Walls towards the front door and apparently assaulted him with a "punch" before shooting him. See *State v. Herbert*, 3d Dist. No. 5-07-51, 2009-Ohio-914, at ¶26.

{¶39} In addition, Mr. Walls was not merely restrained while Nieves searched for money and marijuana. Rather, Nieves attempted to subdue him by hitting him with the butt of the shotgun, restrained him on the ground, then forced him to move to other areas throughout the home after Nieves and his partner had already robbed Ms. Taylor.

{¶40} Nieves' victims were exposed to a substantially greater risk of harm than was necessitated by the commission of the aggravated robbery. The offense of aggravated robbery in this case did not require the use or threat of the use of force. Rather, it was sufficient that Nieves displayed or brandished a deadly weapon in connection with the offense. By holding the child, forcing Ms. Taylor to the ground and leaving her under his accomplice's guard, and forcing Mr.

Walls at gunpoint into other areas of the home after robbing Ms. Taylor, Nieves exposed all three victims to a substantially greater risk of harm than necessary to accomplish aggravated robbery. See *State v. Champion* (Mar. 5, 1999), 2d Dist. No. 17176. Accordingly, the trial court did not err by sentencing Nieves on the three kidnapping counts.

{¶41} Second, Nieves argues that the offenses of aggravated burglary, aggravated robbery, having a weapon under disability, and possession of a dangerous ordnance are allied offenses of similar import. This Court disagrees.

{¶42} We have enunciated the elements of aggravated robbery above. Nieves was convicted of aggravated burglary in violation of R.C. 2911.11(A)(1), which states that "[n]o person, by force, stealth, or deception, shall trespass in an occupied structure *** when another person other than an accomplice of the offender is present, with purpose to commit in the structure *** any criminal offense, if [t]he offender inflicts, or attempts or threatens to inflict physical harm on another[.]" He was convicted of having a weapon while under disability in violation of R.C. 2923.13(A)(3), which states that "[u]nless relieved from disability ***, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance if *** [t]he person is under indictment for *** any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse ***." Nieves was convicted of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A), which states that "[n]o person shall knowingly acquire, have, carry, or use any dangerous ordnance." A "dangerous ordnance" includes, among other things, sawed-off firearms, ballistic knives, explosive or incendiary devices, weapons and ammunition designed and manufactured for military purposes, and firearm mufflers and silencers. R.C. 2923.11(K).

{¶43} Nieves first argues that aggravated robbery and aggravated burglary are allied offenses. Numerous Ohio courts have analyzed this issue and concluded that they are not. See, e.g., *State v. Brown*, 3d Dist. No. 1-05-11, 2005-Ohio-6177, at ¶7, citing *State v. Stern* (2000), 137 Ohio App.3d 110, 116; *State v. Williams* (1996), 74 Ohio St.3d 569, 580; *State v. Lamberson* (Mar. 19, 2001), 12th Dist. No. CA2000-04-012. See, also, *State v. Hairston*, 10th Dist. No. 06AP-420, 2007-Ohio-143, at ¶27. Comparing the elements of aggravated robbery (R.C. 2911.01(A)(1)) and aggravated burglary (R.C. 2911.11(A)(1)) in the abstract demonstrates that the commission of one offense does not result in the commission of the other. Specifically, a conviction for aggravated burglary requires a trespass and the infliction, or attempted or threatened infliction, of physical harm on another. A conviction for aggravated robbery does not require a trespass, but requires that the offender have a deadly weapon on his person and that he display, brandish, indicate possession, or use the deadly weapon. Because each offense requires proof of elements that the other does not, aggravated robbery and aggravated burglary are not allied offenses of similar import.

{¶44} Nieves further argues that having a weapon under disability and unlawful possession of dangerous ordnance are allied offenses of similar import to both aggravated robbery and aggravated burglary. Again, comparing the elements in the abstract, the commission of the aggravated offenses does not result in the commission of either weapons offense. A conviction for having a weapon under disability requires proof of a disability, in this case, Nieves' stipulated indictment for a drug offense. Neither aggravated robbery nor aggravated burglary require proof of a disability, while the first requires the attempt or commission of a theft offense, and the second requires a trespass. A conviction for unlawful possession of a dangerous ordnance requires the acquisition or carrying of any dangerous ordnance. Aggravated robbery

requires the carrying or control of a deadly weapon, as distinct from a dangerous ordnance. Aggravated burglary, under the relevant subsection, requires a trespass, but does not require the possession or use of any weapon or dangerous ordnance. Because having a weapon under disability and unlawful possession of a dangerous ordnance both require proof of elements that aggravated robbery and aggravated burglary do not, they are not allied offenses of similar import. Neither are the offenses so similar that the commission of one offense will necessarily result in commission of any other.

{¶45} Third, Nieves argues that felonious assault is an allied offense of murder and aggravated burglary. This Court disagrees.

{¶46} Nieves was convicted of murder in violation of R.C. 2903.02(B), which states that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." Both aggravated robbery and aggravated burglary constitute "offense[s] of violence." R.C. 2901.01(A)(9)(a). Both are also felonies of the first degree. Nieves was convicted of felonious assault in violation of R.C. 2903.11(A)(1)/(2), which state that "[n]o person shall knowingly *** [c]ause serious physical harm to another *** [or] [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance." We have previously defined aggravated burglary.

{¶47} This Court has previously held that "[f]elony murder and felonious assault are not allied offenses of similar import." *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶7, citing *State v. Jones*, 2d Dist. No. 21522, 2007-Ohio-1035, at ¶18. We explained: "This is so because one can commit a felony murder without committing felonious assault or vice versa."

Wharton at ¶7. Moreover, the evidence in this case establishes a separate animus for the murder and felonious assault. Ms. Taylor testified that the heavyset offender repeatedly hit Mr. Walls in the head with the butt of the shotgun. The Lorain County coroner Dr. Paul Matus testified that Mr. Walls suffered two blunt force lacerations to his scalp, neither of which would have been fatal. The coroner testified that Mr. Walls died from exsanguinations (bleeding out) as a result of a gunshot wound to the spine and liver. Lieutenant James Rohner of the LPD authenticated taped phone calls made by Nieves from jail. During one phone call, Nieves sang a rap song he wrote, including the lines: "Started off as a lick and ended up into a murder. Now I'm hoping and wishing the boys don't find the f***ing burner." Lt. Rohner testified that "burner" is street lingo for weapon, while "boys" is a reference to the police. Accordingly, the evidence demonstrates a separate animus for the felonious assault as compared to the murder.

{¶48} Finally, Nieves argues that aggravated burglary and felonious assault are allied offenses. He cites no authority for this assertion. In fact, Ohio courts have held that aggravated burglary and felonious assault are not allied offenses of similar import. See, e.g., *State v. Barker*, 2d Dist. No. 22779, 2009-Ohio-3511, at ¶18, citing *State v. Johnson*, 5th Dist. No. 06CA070050, 2006-Ohio-4994; *State v. Feathers*, 11th Dist. No. 2005-P-0039, 2007-Ohio-3024; *State v. Jackson* (1985), 21 Ohio App.3d 157. The *Jackson* court reasoned: "Felonious assault is an offense against another's person, while aggravated burglary is an offense against property. Therefore, these two offenses do not merge for sentencing purposes." Id. at 159. This Court agrees and holds that felonious assault and aggravated burglary are not allied offenses of similar import.

{¶49} Because we conclude that none of the offenses as argued are allied offenses of similar import, Nieves' third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED IN FAILING TO MAKE FINDINGS AND OFFER ITS REASONS FOR IMPOSING A CONSECUTIVE SENTENCE IN THE INSTANT MATTER."

{¶50} Nieves argues that, in light of the United States Supreme Court's holding in *Oregon v. Ice* (2009), -- U.S. --, 129 S.Ct. 711, the trial court erred by failing to make findings and state its reasons for imposing consecutive sentences. This Court disagrees.

In *Ice*, the Supreme Court considered the following question:

> "When a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?" Id. at 714.

The high court held that a law in those jurisdictions which "constrain judges' discretion [in sentencing] by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences" is not violative of the Sixth Amendment. Id. at 714-15.

{¶51} The Ohio Supreme Court clearly held in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph seven of the syllabus: "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Nieves argues that the United States Supreme Court's holding in *Ice* supersedes the holding in *Foster*. The Tenth District Court of Appeals addressed the same argument in *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, at ¶18, holding "[t]he Supreme Court of Ohio has not reconsidered *Foster*, however, and the case remains binding on this court." See, also, *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, at ¶25.

{¶52} This Court agrees with our sister district. The *Ice* court does not mandate that trial courts make findings or give their reasons for the imposition of consecutive sentences.

Unless and until the Ohio Supreme Court revisits and reverses its holding in *Foster*, we are bound to follow the law as it currently stands. Nieves' fourth assignment of error is overruled.

III.

{¶53} Nieves' assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

KREIG J. BRUSNAHAN, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.